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Supreme Court of the United States

OCTOBER TERM — 1945

No. 579

CHESTER BOWLES, Administrator, Office of Price Administration,

Respondent,

against

870 SEVENTH AVENUE CORPORATION, doing business as THE PARK CENTRAL,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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MARTIN LIPPMAN,
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870 SEVENTH AVENUE CORPORATION, doing business as THE PARK CENTRAL,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner, 870 Seventh Avenue Corporation, respectfully alleges:

A

Summary Statement of Matter Involved

The petitioner owns and operates The Park Central Hotel in New York City. It seeks review of so much of the judgment of the Court below as permanently enjoins it from increasing the prices which it charges under its so-called "Budget Plan" for meals served in one of its dining rooms known as the Hawaiian Room. The decision below is that the petitioner, in making that increase in prices, violated Section 2 of Restaurant Maximum Price Regulation 2-1, established by the Office of Price Administration under the Emergency Price Control Act of 1942.

That section of the Regulation fixes maximum prices for meals at the highest price at which the meals were *offered* during the period April 4-10, 1943. The prices which the petitioner is enjoined to maintain, however, were never offered or made during the base period or for a long period prior thereto. On the contrary the petitioner *offered* meals in its Hawaiian Room during the base period only at prices considerably in excess of those which it is enjoined to maintain.

The prices so imposed by the judgment below were established by contracts with its Budget Plan tenants in the summer and fall of 1942. It is not disputed that basic food prices and labor costs rose materially in the ensuing months. The Office of Price Administration has itself officially recorded that, in reflection of those increases, restaurant prices also rose during the same period. When, therefore, the Regulation specified the period April 4-10, 1943, as the base period, it was accompanied by a formal statement from the Administrator that that particular period in April 1943 was chosen with the purpose of accommodating the antecedent increase in costs and prices. But obviously the effect of applying the Regulation to the petitioner's situation is to freeze petitioner's prices at the much lower levels contracted for in 1942.

The question here presented is whether the Courts below were correct in holding that the Regulation was nevertheless intended to cover the petitioner's situation. We shall submit in the annexed brief that the many circumstances in its background, the statement of the Price Administrator accompanying it, and its own explicit language, require a different conclusion.

The action was begun on May 23, 1944, with a demand for a temporary injunction (7-15*). Both sides submitted affidavits containing a full statement of the circumstances. There was no question of fact presented with respect to

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* References are to the folios of the Transcript of Record.

the increase of prices in the Hawaiian Room: the petitioner undeniably has sought to make increases in prices in that room; it is now maintaining its legal right to charge increased prices; and it has desisted only because of the injunction below. As the District Court correctly observed, no further evidence would have been elicited on this issue, or any useful purpose served, through a formal trial (340-1). Accordingly, with the consent of the parties, the District Court made a final adjudication of the issue. Its judgment, dated November 21, 1944, finally enjoined the petitioner from increasing its Hawaiian Room prices (359-65). The judgment of the District Court also carried a provision suspending the effectiveness of the injunction upon terms not now material until thirty days following the decision of the Circuit Court of Appeals for the Second Circuit (363).

Other features of the proceeding are not now material. Certain inadvertent violations of specific a la carte prices for specific dishes occurred in defendant's other dining rooms. As the District Court found, any such violations "were not intentional but were due to error. They have since been corrected on all menus and the defendant is in good faith endeavoring to comply with the Regulation" (Finding V, 375). And in the circumstances the District Court declined to grant an injunction.

Both sides served notice of appeal to the Circuit Court of Appeals for the Second Circuit. That Court affirmed the judgment of the District Court in so far as it permanently enjoined any increase of prices in the Hawaiian Room, and the petitioner now seeks a writ of certiorari only in respect of this portion of the judgment.

The Circuit Court of Appeals reversed the judgment in so far as it refused an injunction in respect of petitioner's other dining rooms. It ruled that the District Court should have sought to insure future obedience to the Regulation by some judicial sanction or threat of sanction. It accordingly remanded the proceedings in respect of this branch of the case "with instructions to the District Court

either to grant an injunction or to enter an order retaining the case on the docket with the right of the Administrator, on notice, to renew his application for injunctive relief should violations recur". At the present moment proceedings as to this branch of the case are pending in the District Court upon the application of the Administrator, made September 13, 1945, for a permanent injunction. In view of the largely discretionary nature of the issue, the petitioner does not here seek review on this aspect of the case.

The decision of the Circuit Court of Appeals was rendered August 3, 1945, and its order for mandate is dated August 20, 1945. The opinion has not yet been officially reported.

B

Jurisdiction

The jurisdiction of this Court rests on Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 USC, sec. 347). Although this Court is empowered to grant certiorari to review the entire judgment of the Circuit Court of Appeals, the petitioner is limiting its request to the portion of the judgment which affects the Hawaiian Room and which, being final and relating as it does to a distinct portion of the case actually severed from the remainder of the proceeding by the mandate of the Circuit Court, is susceptible of separate review by this Court (*Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362).

C

Statute and Regulations Involved

Immediately involved is Restaurant Maximum Price Regulation 2-1, effective July 19, 1943 (8 F. R. 10436, 12445, 15450). It is set out in full in Appendix 2 to the brief annexed hereto; the sections most relevant are set out *infra*, pages 12-13.

The Restaurant Maximum Price Regulations were promulgated under the authority of the Emergency Price Control Act of 1942, approved January 30, 1942 (Public Law 421, 77th Cong., 2nd sess., 56 Stat. 23). Other allied legislation and Executive Orders are referred to in the annexed brief (pp. 13-19, *infra*).

D

Questions Presented and Reasons Relied on for the Allowance of the Writ

Some years ago the Park Central Hotel in New York City established for a limited number of its rooms, and it offered to the public, leases under a so-called "Budget Plan". The offer, which was for a yearly term at a fixed monthly rental, included a lease of a room or suite in the hotel, laundry and valet service of a stipulated value, and dinner every night for each of the lessees in the Hawaiian Room, one of the hotel's restaurants. A number of such leases were made in the summer and fall of 1942, all to begin on October 1, 1942 and to expire on October 1, 1943. None was made thereafter (179, 379-83, 395).

In July 1943 Restaurant Maximum Price Regulation 2-1 was adopted, by which restaurant prices are limited to the prices at which the meals were offered during the basic period, from April 4 to April 10, 1943. The question here presented is whether the Regulation is now applicable so as to prevent the petitioner from raising the prices charged in its leases made to begin October 1, 1943 or thereafter, above the books prevailing in the leases which were made in the summer and fall of 1942. It is clear that the effort of the plaintiff here is to deprive petitioner of the benefit of the increase in prices which occurred between the summer or fall of 1942 and the base period in April 1943, and which, it may be demonstrated, it was the intention of

the Office of Price Administration to permit restaurant owners to enjoy.

The Regulation, Section 2, provides that the maximum price is "the highest price at which you *offered* the same food item or meal" during the basic period. A study of the history and background of the Regulation will demonstrate that the Courts below have misconceived its intent—for until controls basic to regulation of restaurant prices were established in April 1943, it was recognized as neither fair nor feasible to fix maximum restaurant prices; and only when in April 1943 appropriate basic controls were established by Executive Order did it become fair and feasible to fix maximum prices—and then only at the point to which they had then risen rather than at some earlier level.

The Price Administrator in promulgating the Restaurant Maximum Price Regulation recognized this essential background and specifically declared his intention to have the Regulation so operate as to allow to restaurant owners the benefit of the considerable increase in prices which had occurred in the months before April 1943 (Appendix I, see also p. 19, *infra*).

Analysis of the language of the Regulation itself will further demonstrate that it precisely accommodates that purpose, and that to construe it otherwise, as the Courts below have done, is not merely to do violence to its background and the expressed intent of the Administrator, but also to alter the plain meaning of its text (p. 21, *infra*).

In short, the Regulation has been applied in the present case so as to impose upon the petitioner a price level bargained for and fixed at levels prevailing in the summer and fall of 1942 and not in April 1943—notwithstanding the intervening rise in costs; notwithstanding that all restaurants not bound by contract to the earlier levels made corresponding increases in their prices; and notwithstanding that the petitioner did not after September 1942 *offer* meals upon the basis upon which it is now enjoined to provide them. The Regulation, designed to fix maximum restaurant prices as of April 1943, has been given the

effect in the present case of freezing them as of the summer of 1942. This is contrary to its announced purpose, its history and background, and its explicit language.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue out of this Court to the Circuit Court of Appeals for the Second Circuit requiring that Court to certify and send to this Court a transcript of all the proceedings of the Circuit Court of Appeals for the Second Circuit had in this case; that the order of the Circuit Court of Appeals be reviewed and determined by this Court, and be finally reversed; and that your petitioner be granted such other and further relief as may be proper.

870 SEVENTH AVENUE CORPORATION,
By HENRY COHEN,
Its Counsel.

Dated, October 29, 1945.